FREQUENTLY ASKED QUESTIONS
ON THE DEPARTMENT OF ENERGY'S (DOE'S)
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) REGULATIONS

1. What is considered a NEPA Document?

   Answer: DOE defines a NEPA document to include a notice of intent, environmental impact statement (EIS), record of decision, environmental assessment (EA), finding of no significant impact, or any other document prepared pursuant to a requirement of NEPA or the Council on Environmental Quality Regulations [Section 1021.104(b)].[1] The purpose of this broad definition is to ensure that environmental information relative to decisionmaking is distributed and made available to the public [Section 1021.301(a)]. Note that the DOE definition of a "NEPA document" is different from the Council on Environmental Quality's definition of an "environmental document;" i.e., an EA, EIS, finding of no significant impact, and notice of intent (40 CFR 1508.10). Note also that neither the DOE definition of a NEPA document nor the Council on Environmental Quality definition of environmental document includes categorical exclusion determinations.

2. Does the EIS definition include a Supplemental EIS?

   Answer: Yes; the term EIS includes draft, final and supplemental EISs. Note that the Council on Environmental Quality Regulations [40 CFR 1502.9(c)(4)] specify that a Supplemental EIS shall be prepared, circulated, and filed "... in the same fashion (exclusive of scoping) as a draft and final statement...." See Sections 1021.104(b) and 1021.314. (Also see Question 9b, below.)

3. NEPA Review

   a. Is NEPA review required for DOE Orders?

      Answer: Yes; Section 1021.200(a) includes DOE "orders" among those "DOE proposals" for which DOE must "provide for adequate and timely NEPA review" in accordance with Section 1501.2 of the Council on Environmental Quality Regulations. However, many of the activities covered by DOE orders can be categorically excluded, under A13 especially.

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[1] In this paper, DOE's NEPA Regulations, 10 CFR Part 1021, will be cited directly to the Section. The Council on Environmental Quality's NEPA Regulations will be cited fully, e.g., 40 CFR 1506 1(a).

b. When should you begin a NEPA review for a research program?

Answer: As soon as environmental effects can be meaningfully evaluated and before reaching the level of investment or commitment likely to determine subsequent development or restrict later alternatives [Section 1021.212(b)]. This reflects the intent of Section 1502.4(c)(3) of the Council on Environmental Quality Regulations.

4. Permit Applicants

a. May the applicant for a DOE permit prepare an EA or EIS if one is required?

Answer: At DOE's option, an applicant may prepare an EA [Section 1021.215(d)]. However, according to 40 CFR 1506.5(b), DOE is required to make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA. Note that DOE must independently review, evaluate and approve the EA prior to its release. See 40 CFR 1506.5(b) and Section 1021.215(d).

According to Section 1021.215(d), if an EIS is prepared, the EIS shall be prepared by DOE or by a contractor that is selected by DOE. Note that the contractor preparing the EIS must execute a disclosure statement certifying that they have no financial or other interest in the outcome of the project. However, information in support of the preparation of an EIS may be supplied by an applicant provided that DOE independently evaluates and verifies the accuracy of the information received in accordance with 40 CFR 1506.5(a).

b. If a contractor prepares the EIS for a permit applicant, may the applicant fund the preparation of the EIS?

Answer: Yes; according to Section 1021.215(d), if an EIS is prepared by DOE (or by a contractor that is selected by DOE) the EIS may be funded by the applicant. Any contractor selected by DOE to prepare the EIS is required by 40 CFR 1506.5(c) to execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project.

5. Competitive Procurement

a. What environmental documentation is to be prepared before selection under a competitive procurement?

Answer: Provided the action is not categorically excluded from preparation of an EA or EIS under Subpart D, Section 1021.216 specifies that, when relevant in DOE's judgment, DOE shall require the offerors to submit environmental data and analyses as a discrete part of their proposals. Prior to making a selection

among those offerors in the "competitive range," DOE shall prepare and consider an environmental critique [Section 1021.216(d)] that evaluates the environmental data and analyses submitted by the offerors and any supplemental information developed by DOE as necessary for "a reasoned decision." The critique will focus on the pertinent environmental issues and contain the essential elements listed in Sections 1021.216(g).

b. How is the public informed of a selection under the competitive procurement process?

Answer: DOE will prepare an environmental synopsis based on the environmental critique for the purpose of documenting "... the consideration given to environmental factors and to record that the relevant environmental consequences of reasonable alternatives have been evaluated in the selection process" [Section 1021.216(h)]. After a selection has been made, the environmental synopsis is filed with the Environmental Protection Agency and made publicly available as further prescribed in Section 1021.216(h).

c. Can a contract be awarded before the NEPA process is complete?

Answer: Yes--but award shall be contingent upon compliance with and completion of the NEPA process [Section 1021.216(i)].

6. Notification and Coordination

a. Is state notification and coordination required for DOE actions not involving a "facility?"

Answer: DOE shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal and shall provide them an opportunity to review and comment on any DOE EA prior to DOE's approval of the EA. While the definitions of a host state and host tribe refer to a DOE action at an existing facility or construction or operation of a new facility, DOE may also propose to undertake actions for which no facility is involved, e.g., regulatory actions or establishment of efficiency standards. Although DOE's regulations do not require notification and coordination (by definition) for states where no facility is involved, DOE may notify any other state or American Indian tribe that, in DOE's judgment, may be affected by the proposal [Section 1021.301(c)]. Accordingly, affected States and tribes may be included in notification and coordination, whether or not a facility is involved.

b. What are the new procedures for coordination with Tribes?

Answer: Tribes are given the same opportunities afforded to States; e.g., notification of EA determinations, pre-approval review of EAs. A listing of the over 500 federally recognized Tribes is available from the Office of NEPA Oversight. Specific

NEPA contacts for each tribe have not been identified. See Sections 1021.301(c) and (d).

7. Must every EIS be reviewed at least every five years to determine if a supplement is required?

Answer: Only site-wide EISs must be evaluated at least every five years, by means of a "Supplement Analysis," to determine whether a new site-wide EIS, or a supplement, or neither is required [Section 1021.330(d)].

However, according to the Council on Environmental Quality's "Forty Questions," as a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, any EIS that is more than five years old should be reexamined to determine if a supplement is required.

8. Site-wide NEPA documents

a. What is the purpose of a site-wide EIS?

Answer: A site-wide EIS identifies and assesses the individual and cumulative impacts of ongoing and reasonably foreseeable future actions at a DOE site. It has the potential of serving a number of purposes including an evaluation of the collective potential environmental effects and the mitigation of environmental problems and improvement and coordination of agency plans, functions, programs and resource utilization. A site-wide EIS also provides an overall NEPA baseline for a site and is particularly useful for tiering or as a reference when preparing project-specific NEPA documents for new proposals. See Sections 1021.104 and 1021.330. (See also the role of site-wide NEPA reviews in implementing DOE's NEPA/Comprehensive Environmental Response & Compensation Liability Act (CERCLA) integration policy; reference "Guidance On Implementation of the DOE NEPA/CERCLA Integration Policy," by memorandum from Paul L. Ziemer, Ph.D., EH-1, November 15, 1991.)

b. Are site-wide EISs required for all DOE sites?

Answer: No; as a matter of policy when not otherwise required, DOE shall prepare site-wide EISs for certain large, multi-facility DOE sites. DOE may prepare EISs or EAs for other sites to assess all or selected functions of those sites [Section 1021.330(c)].

c. Do site-wide EISs require records of decision?

Answer: Yes; a record of decision is required if DOE decides to take action on any proposal covered by an EIS, including a site-wide EIS.

d. Can there be a site-wide EA? Would a site-wide EA require a finding of no significant impact?

Answer: A site-wide EA may be prepared when it is unclear whether a site-wide EIS is warranted. If the impacts are found to be insignificant, a finding of no significant impact should be issued. Alternately, a determination could be made to prepare a site-wide EIS if there are potentially significant impacts.

A NEPA document for any action may also be prepared at any time to "further the purposes of NEPA" [Section 1021.300(b)]. This may be done for example, to analyze the consequences of ongoing activities, support DOE planning, assess the need for mitigation, fully disclose the potential environmental consequences of an action, or for any other reason. An EA prepared in order to "further the purposes of NEPA" would not necessarily require a finding of no significant impact.

9. Scoping

a. What obligation does DOE have with regard to public notification when there is a lengthy delay between when a decision is made to prepare an EIS and its actual preparation?

Answer: DOE is required to publish a notice of intent in the *Federal Register* in accordance with 40 CFR 1501.7 that contains the elements specified in 40 CFR 1508.22 as soon as practicable after a decision is made to prepare an EIS. However, Section 1021.311(a) provides that when there is "... a lengthy period of time between its decision to prepare an EIS and the time of actual preparation, DOE may defer publication of the notice of intent until a reasonable time before preparing the EIS, provided that DOE allows a reasonable opportunity for interested parties to participate in the EIS process." Also under such circumstances, DOE may publish an advance notice of intent in the *Federal Register* to provide an early opportunity to inform interested parties of the pending EIS or to solicit early public comments [Section 1021.311(b)]. An advance notice of intent does not serve as a substitute for the notice of intent that would be published later.

b. Is a public scoping process required for a DOE supplemental EIS?

Answer: A public scoping process is not required for a supplemental EIS. As explained in the Preamble to the final NEPA regulations, DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed since the original EIS was prepared. Such an approach is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. However, as stated in the Preamble, when the scope of the proposed action has changed, or the importance, size, or complexity of the proposal warrant, DOE may elect to have a scoping process. This is the spirit in which

Section 1021.311(9) should be interpreted, which states that "A public scoping process is optional for DOE supplemental EISs [40 CFR 1502.9(c)(4)]."

10. Are formal revisions to an EIS implementation plan required to be made available to the public?

Answer: The EIS implementation plan and any formal revisions to the EIS implementation plan are to be made available to the public. The purpose of the implementation plan is to provide guidance for the preparation of an EIS and to record the results of the scoping process. Minor adjustments in the EIS preparation (e.g., schedule or document length) would not typically trigger the need to formally revise the implementation plan. Normally, only significant changes in the scope or content of an EIS (e.g., the addition or deletion of an alternative) would warrant a formal revision [Section 1021.312(d)].

11. Is a record of decision required for a supplemental EIS?

Answer: Yes; with the exception of scoping, which is optional (see question 9b.), a supplement to a draft or final EIS is prepared, circulated and filed in the same manner as any other draft and final EIS. See Section 1021.314 (d). This includes the preparation of a record of decision in accordance with Section 1021.315.

12. Mitigation action plans

a. If an EIS has been prepared for a proposed action, does a mitigation action plan have to be approved before a record of decision is issued? Does a mitigation action plan have to be completed before any action is taken?

Answer: A mitigation action plan does not have to be approved before the record of decision is issued, but it may often be desirable to do so. Rather, the mitigation action plan is required prior to taking any action that is the subject of a mitigation commitment. See Section 1021.331(a).

b. If an EA has been prepared for a proposed action, does a mitigation action plan have to be approved before a mitigated finding of no significant impact is issued?

Answer: Yes; if there are mitigations that are essential to render the impacts of the proposed action not significant (thus avoiding the need to prepare an EIS), a mitigation action plan addressing those mitigations is required to be prepared before the finding of no significant impact is issued and the finding of no significant impact is required to reference the mitigation action plan [Section 1021.331(b)].

13. When can DOE take action on a proposal covered by an EIS?

Answer: Section 1021.315(a) provides that no decision may be made on a proposal covered by an EIS during a 30-day "waiting period" following completion of the final EIS, except as provided at 40 CFR 1506.1 and 1506.10(b) and Section 1021.211. Such a 30-day period starts when the Environmental Protection Agency's Notice of Availability for the final EIS is published in the *Federal Register*. No action can be taken until the record of decision has been made public through the *Federal Register* or other means (Section 1021.315 and 40 CFR 1506.6), such as a press release.

14. May DOE revise records of decision and findings of no significant impact?

Answer: A record of decision may be revised at any time, provided that the revised decision is adequately supported by an existing EIS [Section 1021.315(d)]. A "revised record of decision" is subject to the same provisions as a record of decision. See Sections 1021.315(b) and (c).

A finding of no significant impact may also be revised at any time, provided that the revision is supported by an existing EA [Section 1021.322(f)].

15. Is a "no action" alternative required for DOE EAs?

Answer: Yes; EAs prepared for DOE actions are required to assess the no action alternative, even when the proposed action is specifically required by legislation or a court order [Section 1021.321(c)]. Note that the Council on Environmental Quality Regulations [40 CFR 1508.9(b)] require a brief discussion of alternatives in an EA, but do not specifically call out the no action alternative.

16. Variances

a. Is the Secretary's approval necessary for DOE to take an action without observing all provisions in the DOE NEPA Regulations or the Council on Environmental Quality Regulations in emergency situations that demand immediate action?

Answer: No; however, DOE must consult with the Council on Environmental Quality regarding alternative arrangements and publish a notice in the *Federal Register* describing the adverse impacts from the actions taken, further mitigation, and any NEPA documents required. See Section 1021.343(a).

b. Is the Secretary's approval necessary for DOE to reduce time periods established in the Council on Environmental Quality Regulations?

Answer: No; however, DOE must consult with the Environmental Protection Agency and show compelling reasons of national policy. The Environmental Protection Agency would decide whether to reduce the time period and notify the Council on Environmental Quality [see 40 CFR 1506.10(d)]. DOE may also reduce time periods established in DOE's regulations that are not required by the Council on Environmental Quality by publishing an explanatory notice in the *Federal Register* [See Section 1021.343(b)].

c. Who has the authority to approve other variances from the NEPA Regulations?

Answer: Under the DOE NEPA regulations, the Secretary must provide advanced written approval of a variance, which must be soundly based on the interests of national security or the public health, safety, or welfare, but the Secretary may not waive any requirement of the Council on Environmental Quality Regulations (except as provided for in those regulations). In addition, DOE shall publish a notice in the *Federal Register* specifying the variance granted and the reasons. See Section 1021.343(c). The Secretary, however, has delegated the authority to grant variances from provisions of DOE's NEPA regulations to the Assistant Secretary for Environment, Safety and Health. (See the Secretarial Policy Statement on NEPA issued June 13, 1994.)

17. Which documents/decisions are required to be published in the *Federal Register*?

Answer: Notice of intent [Section 1021.311(a)], advance notice of intent [1021.311(b)], record of decision [1021.315(c)], emergency actions, reduction in time periods [1021.343(b)], and other variances [1021.343(c)]. However, as provided for by Section 1507.3(c) of the Council on Environmental Quality Regulations, "[a]gency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals" that are specifically authorized by Executive Order or statute to be kept secret in the interest of national defense or foreign policy.

18. Is it necessary to execute a categorical exclusion for routine maintenance and other continuing operations actions for projects/facilities for which there is an existing NEPA document?

Answer: Operations impacts, including maintenance, should be specifically addressed in NEPA documents, especially in site-wide documents. Any completed valid NEPA review does not have to be repeated [see Section 1021.400(b)].

19. How is the Department's NEPA/CERCLA integration policy affected by the new regulations?

Answer: The DOE NEPA regulations do not affect the NEPA/CERCLA integration policy. The regulations are silent on the integration policy and neutral with respect to the applicability of NEPA to CERCLA actions. [Note: Under the Secretarial Policy Statement on NEPA (issued June 13, 1994), DOE has changed its approach to NEPA review for CERCLA actions. DOE now will rely, as a general rule, on the CERCLA process for review of actions to be taken under CERCLA (except when DOE chooses, after consultation with stakeholders and as a matter of policy, to integrate the NEPA and CERCLA processes for specific proposed actions).]

20. What kind of NEPA review is required to shut down a facility? Can a facility be shut down and subsequently restarted based on a categorical exclusion?

Answer: Under normal circumstances, shutdown and startup of a facility (e.g., workload reductions) is considered part of a continuing operation that does not trigger NEPA review. However, the activities that take place during the shutdown, e.g., facility modification, safety improvements or repair, may require NEPA review if appropriate documentation does not already exist. See 10 CFR Part 1021, Subpart D, Appendices B2.5 and B1.14.

21. Can DOE's lease of its underutilized industrial facilities be categorically excluded from further NEPA review when the private use would also be classified as "industrial" [under 10 CFR Part 1021, Subpart D, Appendix A7 ("Transfer, lease, disposition, or acquisition of interest in property, if property use is to remain unchanged")]?

Answer: This categorical exclusion is only to be applied in cases where the proposed action is limited to a change in ownership or stewardship. It is not appropriate to apply categorical exclusion A7 if the proposed use of a DOE site or facility after lease or transfer is not the same as before the lease or transfer. The phrase "use is to remain unchanged" is to be interpreted narrowly (that is, in regard to specific uses), not broadly (that is, not in regard to categories of uses, such as "industrial use"). Otherwise, there would be uncertainty that the transfer/lease would satisfy the basic criterion for establishing a categorical

exclusion -- namely, that the environmental impacts of the action are insignificant and do not need to be further evaluated.

Transfers, leases, disposition, or acquisitions of property that are part of a broader proposed action should be reviewed for NEPA purposes in the context of the broader proposed action. There are other categorical exclusions that may be appropriate for some DOE proposed leases (for example, Appendix B categorical exclusions B3.6 and B3.10 concern research activities).

22. If a proposed DOE action requires preparation of an EA or EIS, is a categorical exclusion determination required for conceptual (Title I) design for the proposal?

Answer: No. Council on Environmental Quality regulations (40 CFR 1508.23) state that a proposal exists when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated" (emphasis added). A proposal generally does not exist under this definition until conceptual design has been completed. If a proposal does not exist until completion of conceptual design for a project, NEPA review requirements are not triggered.

Proceeding with conceptual design also is not prohibited by 40 CFR 1506.1, which sets forth limitations on actions during the NEPA process, nor by 40 CFR 1502.2(f), which prohibits prejudicial commitment of resources. That is to say, funds can be allocated for conceptual design, if necessary, but not for other purposes that would violate one or both of these prohibitions.

Nevertheless, DOE has listed conceptual design as a categorical exclusion (10 CFR Part 1021, Subpart D, Appendix A9) to clarify that neither an EA nor an EIS is needed and to avoid any potential misunderstanding associated with the absence of such a listing.

23. What are DOE's NEPA responsibilities with respect to work to be performed by a DOE contractor for another Federal agency at the other Federal agency's facility?

Answer: The extent of DOE's NEPA responsibilities in a situation where DOE contractors perform work for another Federal agency depends on the degree of DOE involvement in the project. A DOE "action" is defined in the DOE NEPA Regulations (Section 1021.104) as "[a] project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE's control and responsibility."

DOE normally reviews and approves contractor participation in "work for others" proposals before allowing the contractor to start the work. This review and approval process gives DOE the power to control contractor participation in "work for others"

even when no DOE funds or facilities would be used in performing the work. This degree of control and responsibility is sufficient to require that DOE conduct a NEPA review for these "work for others" proposals.

The scope of the DOE NEPA review is dependent on the degree of DOE control and responsibility for the entire project. If DOE exercises control and responsibility for the entire project (e.g., provides substantial funding or facilities), DOE would be obligated to conduct a NEPA review for the entire project. On the other hand, if DOE (or its contractor) is involved in only a discrete portion of the entire project then, depending on the specific circumstances, DOE could limit its NEPA review to that portion of the project without being obligated to conduct a NEPA review for the entire project.

If the work is being done for another Federal agency, both agencies must satisfy NEPA requirements. Once DOE is obligated to satisfy NEPA requirements for a project, it must do so under its own NEPA procedures. If the other Federal agency prepares an EA or an EIS, DOE could satisfy its NEPA obligations by adopting the EA or participating in the EIS, if those documents satisfy DOE NEPA requirements. Otherwise, DOE would have to prepare its own document (or modify the other agency's document) to meet DOE's own NEPA requirements. Categorical exclusions are based on an agency's experience that the type of action proposed would not significantly affect the quality of the human environment. Thus, it would not be appropriate for DOE to adopt another agency's categorical exclusions.

24. What should I do if I get inconsistent or contradictory guidance from different people within the Office of NEPA Oversight?

Answer: Attempt to clarify inconsistencies with staff. If unable to do so, immediately bring the apparent discrepancy to the attention of the appropriate Division Director, who will conduct any further consultations that may be necessary to provide a clear and correct response.